No. 14222.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

METROPOLITAN FINANCE CORPORATION OF CALIFORNIA,
Appellant,

vs.

CLIFTON C. PIERCE and EILEEN E. PIERCE,
Appellees.

APPELLANT'S OPENING BRIEF.

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I.

BASIS OF JURISDICTION.

This action was commenced in the United States District Court for the Southern District of California, Central Division, upon the ground that there was diversity of citizenship between the plaintiff, a corporation organized and existing under and by virtue of the laws of the State of Delaware, and a citizen of that state, and the defendants, who were citizens of the State of California, and the fact that the amount in controversy exceeded, exclusive of interest and costs, the sum of $3,000.00, to-wit: $3,416.66.

This is a direct appeal from a judgment entered against the plaintiff by said District Court, and this Honorable Court of Appeals therefore has jurisdiction to entertain and hear the within appeal.

II.
STATEMENT OF THE CASE.

This cause, at issue by reason of the complaint filed October 16, 1952, and the answer of the defendants filed December 15, 1952, was determined in the lower court solely upon stipulated facts, the stipulation being thus contained at pages 15 to 40 of the Transcript of Record. Basically the stipulation was as follows:

The plaintiff is a citizen of Delaware, and the defendants are citizens of California, and the amount in controversy is $3,416.66. That on December 28, 1951, the plaintiff executed a document entitled Sale and Exchange of Real and Personal Property, this document being in the nature of an offer, which was accepted by the defendants on January 5, 1952, and except for certain irrelevant exhibits this document was set forth as Exhibit "A" to the stipulation [Tr. of Rec., 17-26].

Following the execution of the foregoing document, hereinafter to be referred to as the Exchange Agreement, the parties entered into escrow instructions with the California Bank, Beverly Hills, California, for the purpose of consummating the transactions set forth in the Exchange Agreement. The escrow instructions were set forth as Exhibit "B" to the stipulation [Tr. of Rec. 27-33]. Exhibit "B" will be hereinafter referred to as Escrow Instructions.

The escrow was completed and closed, and the documents transferring title to the various properties covered

by the agreements were recorded on April 9, 1952. Among the properties encompassed in the agreement were 1121.3/9ths shares of Old Channel Ditch Co. stock and 2856 shares of Young Ditch Co. stock, which stock the parties by their contract agreed was appurtenant to the real property exchanged [Tr. of Rec. 22].

During the period of the escrow, and prior to its close, and on or about the 27th day of March, 1952, the Young Ditch Co. Board of Directors levied an assessment of $1.00 per share on the outstanding capital stock of the corporation, and on the same date notice of assessment was sent to stockholders, which notice specified a delinquency date of May 15, 1952, after which any stock on which the assessment remained unpaid would be advertised for sale at public auction, and would be sold to pay any delinquent assessments, together with costs of advertising and expenses of sale. During the same interim, and on or about April 7, 1952, the Old Channel Ditch Co. Board of Directors levied an assessment of 50 cents per share on the outstanding capital stock. Notice of this assessment was sent to stockholders under date of April 10, 1952, but specified identical terms to that of the Young Ditch Co. in regard to delinquency after May 15, and public sale. The assessments levied by the companies respectively were in the sums of $2,856.00 for the Young Ditch Company and $560.66 for the Old Channel Ditch Company.

On or about April 14, 1952, the plaintiff gave written notice to the defendant, Clifton C. Pierce, of the assess-

ment of the Young Ditch Company, and on or about the 16th of April, having received no reply to its demand to the defendants to pay the assessment, the plaintiff, in order not to have such stock sold at public auction, and thus lose the appurtenant stock, paid the Young Ditch Company the sum of $2,856.00, as specified in the assessment.

Subsequently, and on or about April 29, plaintiff notified in writing the defendant, Clifton C. Pierce, of the assessment theretofore made by the Old Channel Ditch Company and demanded payment of this assessment as well as that it had previously paid on the Young Ditch Company stock assessment. Having had no reply, on or about the 1st of May, 1952, the plaintiff paid the Old Channel Ditch Company in order not to be delinquent in the payment of said stock assessment, and in order not to lose said appurtenant stock through the nonpayment of the assessment. Twice again, on June 12, and July 25, both in the year 1952, the plaintiff demanded of the defendants that they pay to the plaintiff the separate amounts totalling $3,416.66, as set forth in the two assessments, and which had been therefore paid by the plaintiff in order to free the stock from the liens created by the assessments.

The defendants throughout refused to pay any part of the assessments, and have paid no part thereof, and the total assessments are the sum sought to be recovered by this action.

The stipulation also contained a paragraph as to the purpose of the assessments, which was agreed to be the removal of certain willow trees and debris, and other-

wise clean out the ditch and water channels for the benefit of the property received by the plaintiff. It was further agreed that assessments for this purpose had been levied in the past at irregular intervals varying from three to five years, but agreed for the purpose of this litigation to be made every four years, and it was further agreed that the stipulation of fact was only as to fact and was not an admission of the materiality of any fact or the weight to be given any fact [Tr. of Rec. 39].

Following the submission of the stipulated facts, the court took the matter under advisement, and on December 9, 1953, in its minutes ordered judgment for the defendants [Tr. of Rec. 41] and Findings of Fact and Conclusions of Law were submitted, dated and filed December 23, 1953. Judgment was entered accordingly on the same date [Tr. of Rec. 41-48]. The judgment is no more than recitation that the plaintiff take nothing by reason of its complaint. The Conclusion of Law based upon the stipulated fact is singular, and states as follows:

> "At the time plaintiff paid said assessments, and at all times thereafter, defendants were under no duty or obligation to pay said assessments, nor any part thereof" [Tr. of Rec. 46].

From the judgment so entered, the plaintiff has appealed.

III.

SPECIFICATION OF ERRORS.

1. The court erred in concluding that the defendants were under no obligation to pay the assessments levied on the appurtenant water stock prior to the close of escrow.

IV.

ARGUMENT.

1. The Questions Presented by This Appeal Are Solely of Law and Not of Fact.

Although of necessity, facts will have to be referred to to determine the applicable law, and interpretation thereof, there are no questions of fact presented, as the statement previously rendered clearly shows that the stipulation of the parties covered all the facts. The facts presented by the stipulation in reality amount to little more than the statement that the parties had entered into a contract for the exchange of real property, together with the appurtenant water stock, which contract was carried into effect through the use of escrow instructions, and an escrow was opened and closed to handle the transaction. The question truly is one of the interpretation of the agreement. As the controversy was submitted upon an agreed state of facts, the only question before this court on appeal is "whether the judgment clearly defines the effect of the stated facts as a matter of law."

> *1165 5th Avenue Corporation v. Alger,* 288 N. Y. 67, 41 N. E. 2d 461, 141 A. L. R. 1157, citing and quoting from *First v. 5th Avenue Bank of New York,* 280 N. Y. 189, 190, 20 N. E. 2d 388, 389.

2. Title to the Properties, Including the Stock, Passed at the Close of Escrow.

The agreement of the parties, as set forth in the Exchange Agreement, very specifically stated that the exchange was to be completed and consummated at the closing date of the escrow [Tr. of Rec. 24]. The parties by their act of stating that the closing date of escrow would

be the date at which the exchange would be completed and consummated, have terminated the right of the courts, or anyone, to state that title passed at any different time. The escrow was closed on April 9, 1952 [Finding of Fact V, Tr. of Rec. 43], and it is this latter date which is the controlling date for the completion of the agreement.

It has been said that title obtained through an escrow relates back to the opening of the escrow, and that equitable title passes as of the date the escrow is opened. This doctrine is applicable only in the event the parties have not contracted to the contrary. In this instance, the parties have contracted to the contrary, but even assuming that the parties had not specifically stated that the Exchange Agreement would be completed as of the close of escrow, the so-called doctrine of "relation back" is not applicable under the current facts. This doctrine will be applied only where it is necessary to give "effect to the instrument, to prevent injustice, or to effectuate the intention of the parties. In other words, its application depends on its consequence in the particular case. It will be applied where, and only where, it will produce a result required by equity and justice" (117 A. L. R. 74).

The annotation cited above quotes from *McMurtrey v. Bridges* (1913), 41 Okla. 264, 137 Pac. 721, in its note at page 89, which clearly shows that the grantee may recover taxes which became due and were a lien upon the land at the close of escrow.

Likewise, it has been held that the grantor in possession was liable for the taxes accruing during the term of the escrow and prior to final delivery of the deed.

Mohr v. Joslin (1913), 162 Iowa 34, 132 N. W. 981.

In the same vein, the text matters have dealt with the subject of taxes during the term of the escrow.

See 19 Am. Jur., Escrows, Sec. 30, page 452.

It is logical and proper to, by analogy to the cases relating to taxes, state that assessments either private or public, levied during the term of the escrow, are the responsibility of the owner of the stock, in this case clearly the liability of the defendants.

3. Title to the Stock Not Having Passed Until the Close of Escrow the Assessment Was a Lien Against the Property at the Close of Escrow.

The laws of the State of Nevada, the home of both of the ditch companies, provide for assessments on paid up stock. (Nevada Compiled Laws, Sec. 1603, (6).) No section of the Nevada laws states the manner of assessment, except Section 1673 of the Nevada Compiled Laws which relates to the assessment on dissolution by the Directors as Trustees, and this section provides for personal liability and sets forth proposals which appellant believes are proper, any time there is need for funds by assessment, whether under Section 1673 or 1603(6).

The assessment having been made in each instance by the Board of Directors, became at the time of the assessment a lien on the individual shares of stock in the hands of the owner, and were a charge against the stock, and hence against the land at the time of transfer. Had the plaintiff not undertaken to pay off the assessment and released the lien by May 15, then the property could be, and would be, sold by the respective companies.

In connection with the liens against the property, the parties again specifically contracted as to the extent of

such liens [Tr. of Rec. 21-22]. It was not contemplated that the plaintiff would in addition assume the liability of $3,000.00 for the assessment on the water stock, which assessment was levied during the period of the escrow.

It was expressly provided also that the contract between the parties, as set forth in the Exchange Agreement, was to be the controlling document, and that nothing in the escrow instructions were to alter this contract. At page 2 of the escrow instruction, in the next to the last paragraph, it is provided as follows:

> "These escrow instructions are drawn pursuant to a certain Exchange Agreement dated December 28, 1951, and executed by the parties hereto, a copy of which is handed you herewith, and shall not in any way be construed to alter, supersede, cancel or change said agreement. However, California Bank, as escrowee is not to be concerned with the terms, conditions, validity or performance of said agreement" [Tr. of Rec. 30].

In addition to having contracted the amount of lien, the parties provided in their agreement that "insurance, rents and *other expenses affecting said properties* shall be prorated as of the date this exchange is completed and consummated, which shall be the closing date of said escrow" [Tr. of Rec. 24]. (Emphasis added.)

The question may then be asked as to whether or not assessments of the nature herein set forth are pro-ratable. The term "pro-rate" has been defined as follows:

> 1. " 'Prorate': To divide or distribute proportionately; to assess prorata.
>
> " 'Prorata': Proportionately; according to share, interest or liability of each."
>
> *Webster's New International Dictionary,* 1951 Edition.

2. "'Prorata': The term is generally understood to denote a disposition of a fund or sum indicated in proportion to some rate or standard, fixed in the mind of the person speaking or writing, manifested by the words spoken or written, according to which rate or standard the allowance is to be made or calculated. The fund of which distribution is thus to be made must be indicated by the words spoken or written by the speaker or writer."

Law Dictionary with Pronunciations by James A. Ballentine (1930).

"'Prorate': A verb derived from the term 'prorata' and meaning to divide or distribute proportionately; to assess prorata."

Law Dictionary with Pronunciations by James A. Ballentine (1930).

3. *Rosenberg v. Frank,* 58 Cal. 387, 406:

". . . It is well understood by persons of ordinary intelligence to denote a disposition of a fund or sum indicated in proportion to some rate or standard, fixed in the mind of the person speaking or writing, manifested by the words spoken or written, according to which rate or standard the allowance is to be made or calculated. The fund of which distribution is thus to be made must be indicated by the words spoken or written by the speaker or writer."

4. *Hendrie v. Lowmaster,* 152 F. 2d 83, 85:

"The only appearance of ambiguity in the original order of the court arises from the words 'pro rata distribution among its shareholders.' '"Pro rata" means according to a measure which fixes proportions. It has no meaning unless referable to some rule or standard.' Chaplin v. Griffin, 252 Pa. 271, 97 A. 409, Ann. Cas. 1918C 787; Brombacher, *et al.* v. Berking, *et al.,* 56 N. J. Eq. 251, 39 A. 134."

From the foregoing definitions of the term "prorate" it is clear that the proration may be 50-50, 75-25, 90-10, 99-1 or even 100-0. In the instant case, it is clear that this proration must be 100-0, and that the 100 must fall upon the defendants for the reason that there is no fixed standard by which to prorate the assessment.

The Board of Directors with power to levy assessments at any time the funds are needed may do so within a week of a prior assessment, or several years later.

The fact that an average period for the purposes of the present assessment was agreed to, is of no concern to the parties, nor is in fact the purpose of the assessment. It does not matter that the clearing of the ditch will benefit the properties in the future, for it is just as logical to assume that the assessment is levied for the purpose of clearing the mess created by the past use not for the benefit of future use. Therefore, the four years set forth in the stipulation is immaterial and is not a term over which there could be any proration of the assessments, except on the basis of 100% and zero.

The clause from the contract above quoted [Tr. of Rec. 24] clearly shows that it is to cover all "expenses affecting said properties." There can be no question but that the assessment liens affected the properties, for the lien having attached when levied by the Board of Directors, the payment of it was an expense affecting the properties. In this connection, the term "expense" was defined in part as follows: "That which is expended, outlay, hence the burden of expenditure, as the expense of war."

Webster's Collegiate Dictionary, 1947.

There can be no question therefore but that the payment by the plaintiff of the assessments was an expense

which affected the properties. As such, pursuant to the agreement, it was a charge for the defendants to have paid, not the plaintiff.

4. Summation.

The burden of paying the assessments levied on the appellant's water stock was the burden of the person who was the owner of the stock on the date the assessment was levied. From the foregoing, it is clear that title did not pass until April 9, 1952, and that the assessments were a lien March 27 and April 7 respectively, and were expenses affecting the property prior to the close of escrow. As such the obligation for the payment of each of the assessments rested upon the defendants, and the trial court erred in concluding otherwise.

CONCLUSION.

It is respectfully submitted that the court below erred in its conclusion and in the entering of a judgment based thereon in favor of the appellees, by misapplying the law to the stipulated state of facts; therefore it is respectfully requested that the decision of the District Court be reversed.

Respectfully submitted,

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